holder of a driving licence authorising him to drive a motor vehicle of that class or description";

(c) an offence under section 74(1) of the Ordinance, which provides "Subject to the provisions of this Part of the Ordinance it shall not be lawful for any person to use ... a motor vehicle unless there is in force in relation to the use of that vehicle by that person ... such a policy of insurance."

I shall deal with offences (a) and (c) together In substance the requirements of the law regarding these two offences relate to the motor vehicle which had no licence and no insurance cover. The real offence cannot therefore be said to relate to the act of driving.

As to (b) Mackinnon J. in *Revell* v. *London General Insurance Co. Ltd., supra,* said:

"The real offence, taking these two types of offences, is using a car without a reflecting mirror or without an insurance policy. In itself the offence has nothing to do with the careful or skilful manner or the careless or unskilful manner in which the car is being driven on the road, or its danger as a moving object."

In my view the fact that a person drives a motor vehicle with no driving licence has nothing to do with the careful or skilful manner in which it is being driven.

MacGillivray on Insurance Law, 5th edition, in paragraph 2077 (vol. 2) cited two cases covering this offence. I have not been able to see the full reports as the Lloyd's Law Reports are not available in the library here. The cases are *Taylor* v. *Eagle Star*[2] where a similar question in a proposal has been interpreted as not to include such offences as driving without a licence or insurance certificate; and *Corcos* v. *De Rougemont,*[3] where it was held that the fact that the insured had frequently driven without a licence was not material.

"Material", for the purpose of section 80(5) of the Road Traffic Ordinance, means of such a nature as to influence the judgment of a prudent insurer in determining whether he will take the risk, and, if so, at what premium and on what conditions. The materiality of any particular misstatement or non-disclosure is a question of fact to be determined by the court. The purpose of an insurance as in this case is to cover the insured in the event of an accident. The primary concern of an insurer before he insures a proposed insured is therefore to determine whether he is a bad risk. I do not think that it should be the concern of a prudent insurer as to whether or not the proposed insured has committed an offence for non-compliance of statutory requirements which are not pertinent to show that he is such a risk. I cannot accept the assistant manager's contention that a person who has committed the statutory offence as in this case shows that he is irresponsible for the purpose of an insurance cover as there are more serious offences which can show that a person is more irresponsible than those the first defendant has been convicted of *e.g.* offences under the Penal Code. The insurers do not appear to concern themselves whether or not the proposed insured has committed any of the offences under the Penal Code. The real test for the purpose of this case, as has been indicated, is whether the proposed insured is a bad risk. I am unable to see that by the conviction of the five offences the first defendant is such a risk. I am therefore of the opinion that his answer to the question does not constitute a non-disclosure of a material fact or representation of a fact which was false in some material particular. On this ground, I do not consider that a case has been made out for me to make a declaration which the plaintiffs seeks.

I do not think there is any need for me to deal with the fourth submission of Mr. Williams.

The application is dismissed with costs to the second defendant.

Application dismissed.

Solicitors: *Murphy & Dunbar; Williams & Tennakoon.*

HAJI TAIB v. ISMAIL

[A.C.J. (Syed Agil Barakbah J.) April 27, 1971]

[Alor Star — Civil Appeal No. 7 of 1970]

Landlord and Tenant — Padi cultivator — Padi land — Tenancy agreement — Whether to be executed and registered under Padi Cultivators (Control of Rent and Security of Tenure) Ordinance, 1955 — Position of tenant where non-compliance.

Tort — Trespass — Tenant deprived of cultivating land subject to tenancy — Position where tenancy agreement not entered into in accordance with law — Whether landlord has better right — Whether actionable.

Contract — Contravention of statute — Breach of contract — No relief.

Equity — Expenses incurred in ploughing land in expectation of cultivation — Compensation in lieu of general damages.

This was an appeal against the decision of the president of the sessions court, Alor Star. The respondent, a padi planter, was tenant of 5 relongs of padi land owned by the appellant. He had occupied the said land for 18 years until June, 1966. Before 1958 the respondent was cultivating more than 10 relongs of the appellant's land, but sometime in that year the appellant took back half of the land. A tenancy agreement for the 1958/9 season to the extent of the remaining half portion (i.e. 5 relongs) was executed and duly registered under the Padi Cultivators (Control of Rent and Security of Tenure) Ordinance, 1955. The respondent thereafter continued to cultivate the land and paid rent accordingly to the appellant.

Sometime in 1963, on a request in writing by the appellant, the respondent paid rents to the appellant's nephew. Receipts of such payments were acknowledged by the nephew. The respondent was never in arrears of rent.

In June 1966, the respondent alleged that the appellant, without any notice whatever, occupied the said land by sending a tractor to plough it, thereafter planted it with padi and harvested it, when in fact he (the respondent) had already cultivated and prepared the land for planting. The respondent accordingly sought relief from the Padi Committee, Kota Star, under the Padi Cultivators Ordinance, and on July 30, 1966, the committee made an order allowing the respondent to execute a tenancy agreement with the appellant. The appellant refused to do so. No further action was taken by the respondent under the Ordinance and he continued to cultivate the land and paid rents to the appellant.

The respondent brought an action against the appellant for trespass and damages on the grounds that he (the res-

pondent) was deprived of cultivating the land and deriving benefit therefrom for the 1966/67 season and had thereby suffered special and general damages.

The learned president, while holding that it was illegal for the appellant (landlord) to collect rent without a tenancy agreement, held that the documents evidencing payments of rent established the relationship of landlord and tenant notwithstanding that the respondent had not complied with the mandatory provisions of the Padi Cultivators Ordinance.

Held, allowing the appeal: (1) no landlord is allowed to receive any rent from the tenant unless a memorandum of agreement is registered under the said Ordinance. In the present case, both the landlord and the tenant have contravened the provisions of the Ordinance in failing to enter into a written argeement;

(2) the parties are in *pari delicto*. Having contracted out of the Ordinance they could not contract into it. A contract executed in contravention of a statute creating a duty or imposing obligation is invalid and unenforceable. In the circumstances, the parties having contracted contrary to the Padi Cultivators Ordinance, the plaintiff/respondent could not therefore seek relief from the court for any breach of the agreement;

(3) the Ordinance taken as a whole shows that it does not recognise any agreement entered into between a landlord and tenant outside its scope and ambit unless the landlord registers the agreement within a specified time or the tenant seeks redress to compel the landlord to execute a proper tenancy agreement if the former refuses to apply for registration;

(4) taking into consideration the purpose and object of the Ordinance and the various provisions dealing with security of tenure for tenant cultivators of padi lands, the Ordinance is a complete and comprehensive code by itself. As such it constitutes such "other provisions" within the first exception of section 3(1) of the Civil Law Ordinance, 1956. It followed therefore that no common law relationship of landlord and tenant in the real sense of the word had arisen between the parties;

(5) the respondent was not a tenant at will but a bare licensee having a permissive occupation short of a tenancy, therefore, the action of the appellant amounted only to forcible entry and he could not be sued for trespass to the land to which he had a better right to possession. However, the respondent was compensated for the expenses he had incurred in ploughing the land in expectation of cultivation, in lieu of the award for general damages.

Cases referred to:-

(1) *Datin Siti Hajar* v. *Murugasu* [1970] 2 M.L.J. 153.

(2) *Errington* v. *Errington & Woods* [1952] 1 K.B. 290.

(3) *Hemmings* v. *Stoke Poges Golf Club* [1920] 1 K.B. 720.

CIVIL APPEAL.

R. K. Sharma for the appellant.

E. Mayandi for the respondent.

Syed Agil Barakbah J.: This is an appeal against the decision of the President of the Sessions Court, Alor Star, made on the 15th day of March, 1970, giving judgment in favour of the plaintiff/respondent in the sum of $1,224 as special damages and $500 as general damages for alleged unlawful trespass by the defendant/appellant.

The brief facts as accepted by the learned president were that the respondent, a padi planter, was tenant of 5 relongs of padi land belonging to the appellant and had occupied the said land as such for the last eighteen years until June, 1966. Before 1958 the respondent was cultivating more than 10 relongs of the appellant's land but sometime that year the appellant took back half of the land. A tenancy agreement for the 1958/59 season to the extent of the remaining half portion, i.e. 5 relongs, was executed and duly registered under the Padi Cultivators (Control of Rent and Security of Tenure) Ordinance, 1955. (Ex. P1). The respondent thereafter continued to cultivate the land and paid rents accordingly to the appellant. Sometime in 1963, on a request in writing by the appellant, the respondent paid rents to the appellant's nephew. (Ex. P2). Receipts of such payments were acknowledged by the latter. (Ex. P3 and P4). The respondent was never in arrears of rent. Sometime in June, 1966, the respondent alleged that the appellant without any notice whatever occupied the said land by sending a tractor to plough it, thereafter planted it with padi and harvested it, when in fact he (the respondent) had already cultivated and prepared the land for planting. The respondent accordingly sought relief from the Padi Committee, Kota Star, under the Padi Cultivators Ordinance, and on 30th July, 1966, the committee made an order allowing the respondent to execute a tenancy agreement with the appellant. The appellant refused to do so. However, no further action was taken by the respondent under the Ordinance and he continued to cultivate the land and to pay rents to the appellant.

It was further pleaded that as a result of the appellant's unlawful trespass the respondent was deprived from cultivating the land and deriving benefit therefrom for the 1966/67 season and had thereby suffered special and general damages.

There are several grounds of appeal which may be summarised as follows:—

(1) The the learned president while holding that it was illegal for the appellant (landlord) to collect rent without a tenancy agreement, erred in law (a) in holding that the documents evidencing payments of rent established the relationship of landlord and tenant notwithstanding that the respondent had not complied with the mandatory provisions of the Padi Cultivators Ordinance; and (b) in failing to consider the effects of such illegality.

(2) Since the cause of action arose out of an illegal transaction there could not be any legal right to possession of the land by the respondent.

(3) In the absence of a proper tenancy agreement, the relationship between the parties, if any, would not be anything more than that of a licensor and licensee.

(4) The common law concept of landlord and tenant does not apply because of the special provision in the Padi Cultivators Ordinance, 1955.

For the purpose of clarity I propose to deal with all the grounds together.

It was conceded by counsel for the appellant that there was a valid tenancy agreement (Ex. P1) properly executed between the parties under the Ordinance for the season commencing from 1958 till 1959. Thereafter no further agreement was executed. In other words, both parties had contracted outside the Ordi-

nance, the tenant continuing to pay rents all along and the landlord receiving them until 1966 when he went into possession and ousted the former from the land in question. It should be noted that the action brought by the plaintiff/respondent was for trespass. The principle as regards action for trespass to land is based on exclusive possession of which the person complaining of the trespass is entitled. It is not necessary that the plaintiff's possession should be lawful, and actual possession is good against all except those who can show a better right to possession in themselves. (*Halsbury's* Laws of England, Third Edition, Volume 38, pages 743/4). In the light of this principle it is to my mind necessary to consider the relationship between the two parties.

Now, the Ordinance considered as a whole covers a sufficiently wide ground providing for security of tenure for tenant cultivators and for other purposes incidental thereto apart from its requirement for registration of tenancy agreements. All tenancy agreements binding on the parties at the commencement of the Ordinance are subject to its provisions which prevail over any term, stipulation or condition of the agreements in case of conflict. It covers written as well as oral agreements. It requires a tenancy agreement to be in writing signed by the landlord and tenant and attested by an officer appointed for the purpose. A landlord is compelled to register such agreement within a stipulated time and a tenant is accorded the right to have it registered if the landlord fails to do so. A tenant is entitled to an option to a renewal of his tenancy or to apply for execution of a new tenancy agreement if the landlord fails to grant a renewal. No landlord is allowed to receive any rent from the tenant unless a memorandum of agreement is registered. Contravention thereof is made punishable under section 16(2) by fine or imprisonment or both. A committee established under the Ordinance is given wide powers to determine disputes arising between landlords and tenants and to make orders so as to give effect to determination of such disputes. An appeal lies to a tribunal whose decision is final. It is apparent that the Ordinance imposes obligations or creates duties on the landlord for the purpose of achieving its main object of providing security of tenure for the tenant cultivators. It prohibits by implication the execution of any agreement outside its scope and contrary to its provisions. In the present case both the landlord and the tenant have contravened the provision of the Ordinance in failing to enter into a written agreement. The landlord has failed to have it registered and has been receiving rents from the tenant, also contrary to the Ordinance. The tenant, on the other hand, has failed to pursue the matter, say by appealing to the tribunal against the order of the committee which was merely permissive. There was nothing to stop the committee from making an order compelling the landlord to execute a proper memorandum of agreement with the tenant under section 3(2) thereof. Had he appealed he would have obtained a proper order. Instead he acquiesced in the matter and continued to pay rent to the landlord.

The legal effects of the above to my mind result in the following:—

(1) In the first place the parties are in *pari delicto*. Having contracted out of the Ordinance they could not contract into it.

(2) Secondly, a contract executed in contravention of a statute creating a duty or imposing obligation is invalid and unenforceable. This is expressed by the legal maxim: *pactis privatorum juri publico non derogatur*. Where a contract, express or implied, is expressly or by implication forbidden by statute, no court will lend its assistance to give it effect. To make a contract void or unenforceable it is not necessary that the statute should prohibit it under specific penalties or declare it illegal. It is also a well recognised principle of law that any contract will be held void, although it is not in contravention of the specific directions of a statute, if it is opposed to the general policy. (See *Craies* on Statute Law, Sixth Edition, pages 251-256). In the circumstances the parties having contracted contrary to the Padi Cultivators Ordinance, the plaintiff/respondent cannot therefore seek relief from the court for any breach of the agreement.

(3) Thirdly, the Ordinance taken as a whole shows that it does not recognise any agreement entered into between a landlord and tenant outside its scope and ambit unless the landlord registers the agreement within a specified time or the tenant seeks redress to the committee to compel the landlord to execute a proper tenancy agreement if the former refuses to apply for registration.

What is then the relationship between the appellant and the respondent? Is there a relationship of landlord and tenant at common law? That is what I think the learned president meant when he concluded that the documents produced during the proceedings showed a relationship of landlord and tenant.

As regards the application of the common law of England to this country in the face of statutes, the matter was dealt with in detail in *Datin Siti Hajar* v. *Murugasu*.[1] At pages 154 to 155 I discussed the effect of sections 3(1) and 6 of the Civil Law Ordinance, 1956. Section 3(1) provides only two qualifications whereby the common law of England is applicable to the Federation, namely: —

(1) it only applies if there is no other statutory provision locally;

(2) it may be applied only so far as the circumstances of the States comprised in the Federation and their respective inhabitants permit and subject to such qualifications as local circumstances render necessary.

On the other hand, the provision of section 6 clearly prohibits the introduction into the Federation or any States comprised therein of any part of the law of England relating to tenure. Tenure means the mode of holding or occupying land or the manner of possession.

Taking into consideration the purpose and object of the Ordinance and the various provisions dealing with security of tenure for tenant cultivators of padi lands, the Ordinance is a complete and comprehensive code by itself. As such it constitutes such "other provision" within the first exception of section 3(1) insofar

as land tenure or any estate, right or interest therein is concerned. It follows therefore that no common law relationship of landlord and tenant in the real sense of the word has arisen between the parties In my view, the learned president misdirected himself when he concluded that there was a relationship of landlord and tenant in the present case.

What is the result in law on the facts? The relationship of the parties is open to two possible legal constructions: —

(1) tenancy at will; and

(2) licensor and licensee. That was suggested by Mr. Sharma for the appellant.

In the case of a tenancy at will, it is a tenancy under which the tenant is in possession. The essence is that it should be determinable at the will of either party on demand. It is expressed to be at will taking effect according to its tenor notwithstanding that a rent at an annual rate is reserved. In the absence of any express agreement to determine it at will on either side, the method of creation can be implied An example is where a person has been given exclusive possession of premises for an indefinite period without a declaration of an exact interest that he is to hold and without anything to explain why he has been allowed into occupation. Nevertheless, his true position depends at bottom upon the intention of the parties and the presumption is rebutted if the circumstances negative an intention to create a tenancy at will. (See *Cheshire* on Modern Law of Real Property, Seventh Edition, p. 385).

In the present case there was an absence of any express agreement and no such agreement can be implied that such tenancy should be determinable on demand at the will of either party. In my opinion, their relationship was not that of a tenancy at will.

With respect, I agree with Mr. Sharma's submission that the respondent was a licensee. The principle was quoted by Denning L.J. (as he then was) in *Errington* v. *Errington & Woods*[2] wherein at page 298 His Lordship, after discussing in detail several past cases on the matter, stated as follows: —

> "The result of all these cases is that, although a person who is let into exclusive possession is *prima facie* to be considered to be a tenant, nevertheless he will not be held to be so if the circumstances negative any intention to create a tenancy. Words alone may not suffice. Parties cannot turn a tenancy into a licence merely by calling it one. But if the circumstances and conduct of the parties show that all that was intended was that the occupier should be granted a personal privilege, with no interest in the land, he will be held to be a licensee only."

Applying the foregoing principle to the present case, it seems to me that there was no relationship of landlord and tenant as discussed earlier. The respondent was not a tenant at will but a licensee having a permissive occupation short of a tenancy, *i.e.* to cultivate the land and to pay the seasonal rent according to the agreed amount. Here, a question arises as to whether the respondent can be termed as a contractual licensee as in the case of *Errington* v. *Errington & Woods, supra*. In that case there was a clear promise by the father who had provided a home for his son and daughter-in-law that so long as the married couple continued in occupation and duly paid the instalments to the building society from which he had purchased the dwelling-house, he would then transfer the property to them. It was held that they were licensees having a permissive occupation short of a tenancy, but with a contractual right, at any rate an equitable right, to remain so long as they paid the instalments which would grow into a good equitable title to the house itself as soon as the mortgage was paid. In the present case, as I have pointed out earlier, there cannot be a contractual licence because the parties apart from having contracted outside the Ordinance also contravened the provisions of the Ordinance which rendered the contract void and unenforceable at law. In this respect, I am of opinion that the maxim "equity follows the law" applies, in the sense that a court of equity will not attempt to enforce a covenant which is void at law. (See *Halsbury's* Laws of England, 3rd Edition, Volume 14, p. 526). "Where a rule, either of the common or the statute law, is direct, and governs the case with all its circumstances, or the particular point, a court of equity is as much bound by it as a court of law, and can as little justify a departure from it." (See *Snell's* Principles of Equity, 26th Edition, p. 26). In the circumstances I agree with the submission of Mr. Sharma that the position of the respondent is, in the least, merely that of a bare licensee.

At common law a licence was always revocable at will. However, with the fusion of law and equity a reasonable notice is required to determine a licence of this nature so as to give the licensee sufficient time, *e.g.* to remove his goods. In the present case, in my opinion, a reasonable time should have been given to the respondent to cultivate the land and harvest it before the appellant could dispossess him of the said land. However, the action of the appellant to my mind amounts only to forcible entry but he cannot be sued for trespass to the land to which he has a better right to possession (*Hemmings* v. *Stocke Poges Golf Club*[3]). Nevertheless, it is only fair and equitable for the respondent to be compensated for the expenses he has incurred in ploughing the land in expectation that the appellant would allow him to cultivate it. I would assess the amount of $500 to be reasonable for the purpose in lieu of the award for general damages.

The other grounds of appeal are not important enough to require amplification.

I therefore allow the appeal with costs and set aside the judgment, including the order for special and general damages.

Appeal allowed.

Solicitors: *Sharma & Co.; Jayadeva, Zahir & Ismi.*